

980253

GIFTS TO PUBLIC OFFICIALS

AN OVERVIEW

**Peter S. Wattson
Senate Counsel
State of Minnesota**

Council on Governmental Ethics Laws

COGEL

18th Annual Conference

**Wyndham Franklin Plaza Hotel
Philadelphia, Pennsylvania
December 10, 1996**

TABLE OF CONTENTS

I.	Introduction	1
II.	Legislative History	1
A.	Before 1994	1
1.	1988 Interim	1
2.	1989 Session	1
3.	1991 Session	2
4.	1993 Session	2
B.	1994	2
1.	1994 Interim hearings	2
2.	1994 Session	2
a.	House action	2
b.	Senate action	3
III.	Who is Covered?	4
A.	State Officials	4
1.	Operative language	4
2.	Givers	4
a.	Lobbyists	4
b.	Principals	5
c.	Third parties	5
3.	Recipients	6
a.	Officials	6
b.	Public officials	6
c.	Employees of the Legislature	6
d.	Local officials of a metropolitan governmental unit	6
e.	Third parties	7
B.	Local Officials	7
1.	Operative language	7
2.	"Interested person"	7
3.	"Local official"	7
IV.	What is a Gift?	8
A.	Operative Language	8
B.	Problem Items	8
1.	Food and beverages	8
2.	Entertainment	9
3.	Travel and lodging	9
4.	Honoraria	9
5.	Promises of future employment	9
C.	Transaction Problems	10
1.	Consideration in return	10
2.	Indirect gifts	10

3.	Gifts to an agent	11
4.	Gifts to a group	11
5.	Partial gifts	11
6.	Accounting for gifts	11
7.	Gifts Given Outside the State	11
V.	Exceptions	12
A.	Campaign Contributions	12
B.	Services to Assist in the Performance of Official Duties	12
C.	Services of Insignificant Monetary Value	12
D.	Plaques or Mementos Recognizing Service	13
E.	Trinkets or Mementos of Insignificant Value	13
F.	Informational Material of Unexceptional Value	14
G.	Food or Beverages Given in Connection with a Speech	14
H.	Gifts to Groups of Nonofficials	15
1.	Gifts not related to the official's position	15
2.	Social gifts	15
3.	National conferences	16
4.	Gifts available to the public generally	16
5.	Groups found exempt	16
I.	Gifts by Family Members	17
VI.	Enforcement	17
A.	State Officials	17
1.	Investigation by the Ethical Practices Board	17
2.	Violation is not a crime	17
3.	Advisory opinions	17
B.	Local Officials	17
1.	Violation is a misdemeanor	17
2.	Prosecution of misdemeanors	18
3.	Possible amendment	18
VII.	Examples	18
A.	Schindler's List	18
B.	The Distinguished Gentleman	18
	APPENDIX	19
	Minn. Stat. §10A.071	19
	Minn. Stat. § 471.895	20

I. Introduction

The Minnesota Legislature at its 1994 session passed significant new legislation prohibiting most gifts to public officials. That legislation was based on the premise that a person with a direct financial interest in a decision that a public official is authorized to make should not give that official a gift, lest the gift improperly influence the official's decision. Few would disagree with the proposition that a person should not attempt to influence a public official in this way. In fact, bribery of a public official has been a crime in Minnesota since statehood. *See* Pub. Stat. 1858, ch. 92, § 8; Minn. Stat. § 609.42 (1994).

But at the same time that bribery has been condemned, the giving of gifts in a social context has been approved. Indeed, for thousands of years the giving of gifts has been an accepted way to build and maintain friendships. Friendships are an essential ingredient of politics, and gift giving among politicians is as natural as shaking hands and asking for money.

Historically, drawing the line between appropriate social gifts and inappropriate gifts to influence a public official in the performance of official duties has been left to the judgment of each individual. It has been an ethical problem, rather than a legal one. So, why did the Minnesota Legislature decide to cease relying on the judgment of individuals? First, because a series of ethical lapses by members of the Legislature had left the institution open to criticism that the judgment of its individuals was not good enough. Second, because at least one member believed strongly that public officials were being led into temptations they'd be better off avoiding.

II. Legislative History

A. Before 1994

1. 1988 Interim

The movement in Minnesota to limit gifts to public officials began in the interim between the 1988 and 1989 sessions. Senator Donald M. Moe asked one of my colleagues in Senate Counsel to research the laws of other states that had adopted a code of ethics for public officials. Senate Counsel found that both Wisconsin and Massachusetts had adopted such a code and had considerable experience administering it. The Senate Committee on Governmental Operations held hearings that interim at which the ethics code administrators from those two states testified on how their laws worked. Based on those hearings, Senator John Marty had a bill drafted that was based primarily on the Massachusetts law, Mass. Gen. Laws, ch. 268B, but with some influence from Wisconsin, Wis. Stat. Ann., ch. 19, subch. III.

2. 1989 Session

Senator Marty's code of ethics for public officials was first introduced in the 1989 session as S.F. No. 5. It covered all public officials, local as well as state, under the expanded jurisdiction of the Ethical Practices Board, and prohibited the use of a public position for private gain and revolving door contracts with former public officials, as well as prohibiting gifts that "could reasonably be expected to influence the performance of the official's or employee's public duties."

The bill was referred to the Committee on Elections and Ethics, where it remained. I don't believe it even got a hearing.

3. 1991 Session

In the 1991 session, Senator Marty introduced the bill again, this time as S.F. No. 367. It was again referred to the Committee on Elections and Ethics, but this time it had more success. In 1992 Senator Hughes, the committee's chair, signed on as a co-author and even gave it a hearing, although he never put it to a vote.

4. 1993 Session

After the 1992 election, Senator Marty was in a position to become chair of a committee for the first time. He was assigned to the old Elections committee with a new name, the Committee on Ethics and Campaign Reform.

Senator Marty introduced his bill to create a code of conduct for public officials as S.F. No. 24, but spent almost the entire 1993 session hearing his next bill, S.F. No. 25, which became the Campaign Finance Reform Act of 1993.

B. 1994

1. 1994 Interim hearings

After passage of campaign finance reform, Senator Marty turned his attention to the code of ethical conduct. At hearings in February, before the session began, he took testimony from Common Cause, the League of Women Voters, the Humphrey Institute, the DFL and IR parties, the Minnesota Government Relations Council, the Association of Minnesota Counties, and the Governor's office, about what was needed to improve the ethics of public officials in this state. The speakers recommended action on many of the subjects that were in Senator Marty's bill, but they also recommended that any code of ethics be clear and simple and draw a bright line between conduct that was acceptable and conduct that was not.

2. 1994 Session

a. House action

By the start of the 1994 session, after both the House Majority Leader and the Speaker of the House had resigned their leadership positions because of ethical lapses, and the Majority Leader had pleaded guilty to misuse of the state telephone system and resigned from office, the House of Representatives was even more eager than the Senate to pass some kind of ethics legislation.

The House bill, H.F. No. 1863, authored by Representative Edgar Olson, focused primarily on disclosure of gifts, reducing the reporting threshold for individual gifts from lobbyists from \$50 to \$5 and providing an expedited procedure for disclosing gifts of food and beverages given or made available to all members of the legislature or a legislative body. The House bill passed the House

early in the session and was referred in the Senate to the Committee on Ethics and Campaign Reform, which had been amending, and amending, and amending Senator Marty's bill.

b. Senate action

When the Senate committee reported out H.F. No. 1863, it kept most of the disclosure requirements of the House bill and added a modestly comprehensive prohibition on gifts. I say "modestly comprehensive" because it prohibited most gifts but permitted gifts of food and beverages "given at a reception, meal, or meeting away from the recipient's place of work." In other words, receptions in the capitol would be prohibited but receptions and meals anywhere else were still allowed, subject to the new reporting requirements.

The exception for food and beverages was probably discussed and amended more than any other provision of the bill. It began as part of an amendment offered to S.F. No. 24 by its chief author, Senator John Marty, at a meeting of the Committee on Ethics and Campaign Reform. It exempted "a cup of coffee or other refreshments not to exceed \$3 in value given as part of ordinary office hospitality or at a reception or meeting away from the recipient's place of work" and "a meal, transportation, or other reasonable expenses furnished by an organization before whom the recipient appears to make a speech or answer questions as part of a program."

When H.F. No. 1863 passed the House of Representatives and was referred to the Senate Committee on Ethics and Campaign Reform, Senator Roger D. Moe moved to amend it by substituting a compromise proposal based on the bill that passed the House and the Senate committee's previous discussions. His amendment, adopted by the committee March 8, 1994, included a broad exemption for any "food or a beverage," but it also reduced the threshold for having to report gifts from \$50 to \$5 and created a simplified reporting procedure for gifts of food or beverages. It said that "A lobbyist need report only the aggregate amount and nature of food or beverages given or made available to all members of the legislature or a house of the legislature or to all members of a local legislative body, along with the name of the legislative body and the date it was given or made available." But the Moe amendment was further amended at the same meeting by Senator Marty's amendment to require that the food or beverage be "given at a reception, meal, or meeting away from the recipient's place of work." This narrowed the exemption considerably.

When the bill was considered on the floor of the Senate March 14, Senator David Knutson amended it further to require that the food and beverage not only be given away from the recipient's place of work but also "by an organization before whom the recipient appears to make a speech or answer questions as part of a program." Very few meals would meet this new requirement. So instead of a broad exemption to go with the strict reporting requirement for gifts and simplified procedure for reporting gifts of food or a beverage, the Senate bill had only a very narrow exemption. The reporting requirements no longer fit the exemption.

One might have expected this inconsistency to be worked out in conference committee. But when the amended House file was returned to the House, the House voted to concur in the Senate amendments rather than go to conference. The bill became law with the Governor's signature on March 22, 1994, although it did not become effective until August 1.

III. Who is Covered?

A. State Officials

1. Operative language

The operative language of the bill is very simple. For state officials it says: "A lobbyist or principal may not give a gift or request another to give a gift to an official. An official may not accept a gift from a lobbyist or principal." Minn. Stat. § 10A.071, subd. 2 (1994).

This is an objective test, a flat prohibition. It does not require a subjective determination that the gift was given to influence the official in the performance of official duties. That requirement was amended out of the bill in the Senate committee because it was too difficult to prove. If it were possible to prove that the gift was given to influence the performance of official duties, that would be a bribe under existing law. But the kind of gift Senator Marty was concerned about was not an outright bribe, where there was a *quid pro quo* that could be proven, but rather a gift that was given to gain access and build goodwill—a longer term investment that served to build a close working relationship between a lobbyist and an elected official. The committee, responding to public testimony that called for a bright-line test to clearly identify prohibited conduct, settled on the flat prohibition.

2. Givers

a. Lobbyists

The prohibition is limited to gifts from lobbyists and those who employ lobbyists (called "lobbyist principals"). Lobbyists were the focus of concern because of their obvious interest in influencing the decisions of the officials to whom they make gifts. Limiting the gift ban to them and their principals also served the committee's desire to have a bright-line test—they were already required to register with the Ethical Practices Board so it would be relatively easy to determine the persons to whom the ban applied.

A lobbyist is defined as an individual engaged for pay who spends more than five hours in any month or more than \$250 in a year for the purpose of attempting to influence legislative or administrative action, or the official action of a metropolitan governmental unit, by communicating or urging others to communicate with public or local officials. Minn. Stat. § 10A.01, subd. 11 (1994).

Public officials and public employees who lobby as part of their job are not "lobbyists" for purposes of chapter 10A, except for nonelected local officials and employees who spend more than 50 hours a month lobbying.

Lobbyists must register with the Ethical Practices Board. Minn. Stat. § 10A.03 (1994).

b. Principals

A principal is an individual or association that spends more than \$500 in any calendar year on a lobbyist, or spends at least \$50,000 in a calendar year on efforts to influence legislative action, administrative action, or the official action of metropolitan governmental units. Minn. Stat. § 10A.01, subd. 28 (1994).

Public higher education systems and political subdivisions are listed in § 10A.01, subd. 11, among the entities that may employ a lobbyist, but they are not listed in subdivision 28 among the entities that may be a principal. The Ethical Practices Board has held that the University of Minnesota, a public higher education system, is not a lobbyist principal. Eth. Prac. Bd. Op. No. 224 (1996). The Board has deadlocked over whether political subdivisions may be principals, so at this point they are not.

Principals must be named on the lobbyist's registration form, Minn. Stat. § 10A.03, subd. 2, and must report annually to the Ethical Practices Board. Minn. Stat. § 10A.04, subd. 6 (1994).

An individual who is not a lobbyist or a lobbyist principal, but who is a member of an association that is a lobbyist principal, may make a gift to an official from the individual's own funds, but not from the funds of the association. Eth. Prac. Bd. Op. No. 177 (1994). The gift from the individual's own funds must not be requested or reimbursed by the association. Eth. Prac. Bd. Op. No. 201 (1995).

An association is not made a lobbyist principal simply by virtue of the fact that some of its members may themselves be lobbyist principals. Eth. Prac. Bd. Op. No. 180 (1994); No. 220 (1995).

c. Third parties

A lobbyist or principal may not request another to give a gift to an official. Minn. Stat. § 10A.071, subd. 2 (1994). An official may not accept a gift given as the result of a request by a lobbyist or lobbyist principal. Minn. Rules 4512.0200 (1996). If a trade association that is a lobbyist principal invites legislators to a reception, the legislators may not be given free food and beverages, even if the food and beverages are paid for by individual members of the trade association who are not lobbyists or principals or by a nonprofit foundation that is not a lobbyist or principal. Eth. Prac. Bd. Op. No. 197 (1995).

A lobbyist or lobbyist principal may not request others to donate money or services to a legal defense fund established for the benefit of public officials. Eth. Prac. Bd. Op. No. 242 (1996).

An association that is not a lobbyist principal may not host an event for officials that is paid for by a businessperson who is not a lobbyist or principal if the association was requested to do so by a lobbyist. Eth. Prac. Bd. Op. No. 212 (1995).

An association that is neither a lobbyist principal nor a lobbyist may give copies of its information and referral directory to legislators. Eth. Prac. Bd. Op. No. 205 (1995).

3. Recipients

a. Officials

“‘Official’ means a public official, an employee of the legislature, or a local official of a metropolitan governmental unit.” Minn. Stat. § 10A.071, subd. 1 (c) (1994). The law does not prohibit a gift to the spouse of an official. Eth. Prac. Bd. Op. No. 206 (1995)

b. Public officials

Public officials include legislators, constitutional officers, agency heads and deputy heads, administrative law judges and workers’ compensation judges, various other officials in the executive branch of state government, and various officials of the metropolitan council and of metropolitan boards and commissions. Minn. Stat. § 10A.01, subd. 18 (1994). Judges and referees in the judicial branch are not covered as “public officials,” because they are covered by their own Code of Judicial Conduct. See Code of Judicial Conduct, Canon 5, C. (4) (1994). Judges of the Tax Court are likewise not “public officials.” Eth. Prac. Bd. Op. No. 46 (1978).

c. Employees of the Legislature

Certain employees of the Legislature are covered as public officials, including the Secretary of the Senate, the Chief Clerk of the House of Representatives, the Revisor of Statutes, the Legislative Auditor, and attorneys and researchers in the offices of Senate Counsel and Research and House Research. The rest are covered by the reference to “an employee of the legislature.”

d. Local officials of a metropolitan governmental unit

A “local official” for purposes of chapter 10A is a person who holds elective office in a political subdivision or who is appointed to or employed in a public position in a political subdivision in which the person has authority to make, recommend, or vote on (as a member of the governing body) major decisions regarding the expenditure or investment of public money. Minn. Stat. § 10A.01, subd. 25.

“Metropolitan governmental unit” means the metropolitan council or a metropolitan agency, any of the seven counties in the metropolitan area, a regional railroad authority established by a metropolitan county, and a city in the metropolitan area with a population of over 50,000 (Minneapolis, St. Paul, Bloomington, Brooklyn Park, Burnsville, Coon Rapids, Eagan, Minnetonka, and Plymouth). The Minnesota State High School League and Minnesota Technology, Inc., are also defined in chapter 10A as “metropolitan governmental units.” Minn. Stat. § 10A.01, subd. 26.

e. Third parties

The Ethical Practices Board has had three occasions to consider the propriety of a gift to a nonprofit corporation solicited by an official on behalf of the corporation. Its opinions have gone back and forth over whether such a gift is prohibited. On the first occasion, the Board found that contributions to a charitable event sponsored by an official that were transferred directly to the nonprofit corporation were gifts to the corporation and not a prohibited gift to the official. Eth. Prac. Bd. Op. No. 161 (1994). On the second occasion, the Board found that a gift to a charitable organization was prohibited because it was personally solicited by an official. Eth. Prac. Bd. Op. No. 214 (1995). Most recently, the Board considered the conflict between the two opinions and found that it had been correct the first time, holding that a gift to a nonprofit corporation personally solicited by an official was not prohibited, provided that the official did not directly and personally benefit from the gift and that no part of the gift would be transferred to the official. Eth. Prac. Bd. Op. No. 234 (1996).

B. Local Officials

1. Operative language

"An interested person may not give a gift or request another to give a gift to a local official. A local official may not accept a gift from an interested person." Minn. Stat. § 471.895, subd. 2 (1994).

2. "Interested person"

After the language of the bill had been drafted to apply only to state officials, the committee decided to expand its coverage to include local officials. But, whereas lobbyists at the state level are required to be registered with the Ethical Practices Board, there is no similar requirement for persons who lobby at the local level. So, a term had to be created to describe the kinds of persons from whom gifts would be prohibited. That term is "interested person."

The law says that, "'Interested person' means a person or representative of a person or association that has a direct financial interest in a decision that a local official is authorized to make." Minn. Stat. § 471.895, subd. 1 (c) (1994). This is far from clear, especially in comparison with the definition of a lobbyist or lobbyist principal.

One element that is unclear is what is meant by a "direct financial interest." I take it to mean not the general interest that every taxpayer has in the decisions of a local official, but rather the more immediate and personal interest that one has in a decision that affects one differently from others, such as a tax abatement on a particular parcel.

3. "Local official"

"'Local official' means an elected or appointed official of a county or city or of an agency, authority, or instrumentality of a county or city."

Officials of other political subdivisions, such as school districts, hospital districts, watershed districts, and towns, are not covered by the ban on gifts to local officials. Legislative efforts to add school officials have so far been defeated.

Not every person who works for a county or city is an "official." Officials are those who have significant responsibility for making decisions, not those who simply carry out the orders of others. See BLACK'S LAW DICTIONARY 1235 (4th ed. 1957). The definition of "local official" in Minn. Stat. § 10A.01, subd. 25, is not expressly incorporated into § 475.895, but it does provide some insight into the kinds of individuals the Legislature may have meant to include. It focuses on persons who have authority to make recommendations or decisions regarding the expenditure or investment of money.

IV. What is a Gift?

A. Operative Language

"Gift" means money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, that is given and received without the giver receiving consideration of equal or greater value in return." Minn. Stat. § 10A.071, subd. 1 (b) (1994).

Offering officials a service, in the form of an opportunity to purchase athletic tickets in advance of their sale to the general public, is a gift. Eth. Prac. Bd. Op. No. 178 (1994). Minn. Rules 4512.0100, subp. 3, C (1996). A loan of a picture to be hung in a legislator's office is a gift. Eth. Prac. Bd. Op. No. 181 (1994). A wedding present is a gift. Eth. Prac. Bd. Op. No. 217 (1995).

Purchase of services from an official's commercial business at current prices is not a gift. Eth. Prac. Bd. Op. No. 213 (1995).

The value of a gift is determined by its value to the recipient, not its cost to the giver. The value of transportation in a corporation's aircraft is the amount the official would have to pay to obtain equivalent commercial air transportation, not the cost to the corporation of operating the aircraft. Eth. Prac. Bd. Op. No. 188 (1994).

B. Problem Items

1. Food and beverages

Wining and dining of legislators by lobbyists was probably the most frequently cited reason why the gift ban was needed. That wining and dining often took the form of expensive meals, receptions, and hospitality suites, but also included the delivery of inexpensive bagels, fried chicken, and pizza at the Capitol. Gifts of food and beverages are included in the term "personal property." Minn. Rules 4512.0100, subp. 3, A (1996).

2. Entertainment

The second most common complaint was about gifts of tickets to sporting events. They too are covered by the term "personal property." Minn. Rules 4512.0100, subp. 3, A (1996).

3. Travel and lodging

Free trips, such as the annual trip to Duluth, sponsored by the Duluth Chamber of Commerce for the benefit of all members of the Legislature, were a third subject of complaints of improper gifts to public officials. Free travel and lodging are covered by the term "services."

4. Honoraria

Honoraria for speeches were not a problem complained of, perhaps because the House of Representatives had already adopted a rule during the 1991 session prohibiting its members from accepting honoraria "for any service performed for an individual or organization which has a direct interest in the business before the House . . ." House Rule 10.2. Honoraria are covered by the term "money." Minn. Rules 4512.0100, subp. 3, D (1996).

Note, however, that not every fee received for making a speech is an honorarium. An honorarium is "A payment given to a professional person for services for which fees are not legally or traditionally required." AMERICAN HERITAGE DICTIONARY 620 (2d Col. Ed. 1982). If the speaking fee is legally required, as part of a contractual arrangement with the speaker in advance, it is neither an honorarium nor a gift and is not prohibited.

5. Promises of future employment

Promises of future employment have not been a problem in recent years, at least since the passage in 1986 of Minn. Stat. § 216A.036 (1994), which prohibits a regulated public utility from offering employment to a member of the Public Utilities Commission within one year after the member leaves the commission. But promises of future employment were included in the gift ban in the Wisconsin law that served as one of the bases on which the Minnesota law was built, Wis. Stat. Ann. § 19.42 (1) (Supp. 1993), and remained in the Senate bill from beginning to end.

An increase in salary, a promotion, or a move from a part-time to a full-time position by an official who is employed by a lobbyist principal is not a gift. Eth. Prac. Bd. Op. No. 215 (1995).

A contract for services is not a "promise of future employment" and payments for services provided under a bona fide contract are not gifts. Eth. Prac. Bd. Op. No. 231 (1996).

Bona fide employment search activities, including making and accepting offers of employment, are not prohibited. Eth. Prac. Bd. Op. No. 236 (1996).

C. Transaction Problems

1. Consideration in return

To be a gift, the item of value must be “given and received without the giver receiving consideration of equal or greater value in return.” Minn. Stat. § 10A.071, subd. 1 (b) (1994).

The concept of consideration is useful to keep in mind when determining whether an item of value given in a social context is a “gift” for the purposes of the statutory ban. For example, one common question raised during the consideration of the new law was whether it prohibited a group who dined regularly together from taking turns picking up the check. The answer to that question (never given on the record, to my knowledge), was that another member of the group having picked up the check on a previous occasion might be considered consideration for a member picking up the check today. If it were possible to prove this exchange of hospitality, it would be possible to prove that it was not a gift.

The Ethical Practices Board, however, has taken a different position on consideration. In response to a request for an opinion on the proper procedure to use for reimbursing a lobbyist for the value of a meal provided by the lobbyist to a group of persons, one of whom was an official not permitted to accept the meal as a gift, the Board advised that the reimbursement must be made at the time the meal is provided in order not to be an illegal gift. Eth. Prac. Bd. Op. No. 159 (1994). *Accord*, Eth. Prac. Bd. Op. Nos. 169, 171 (1994).

If a meal is provided to officials registered at a conference sponsored by a lobbyist principal, but the meal is paid for by the registration fee charged to attend the conference, the meal is not a gift. Eth. Prac. Bd. Op. No. 186 (1994). Requiring attendees to make a minimum donation to a charitable fund is not consideration, and the gift of food and beverages to the attendees is prohibited. Eth. Prac. Bd. Op. No. 191 (1994).

An expense-paid trip for two given to an employee of a lobbyist principal for outstanding performance as a salesperson is a form of in-kind compensation to the employee, not a gift. The employee is not prohibited from sharing the trip with the employee’s spouse who is an official. Eth. Prac. Bd. Op. No. 229 (1996)

Reimbursement of expenses incurred by an official who is a member of the board of directors of a corporation that is a lobbyist principal is not a gift, since the corporation receives the services of the official as consideration for the expense reimbursement. Eth. Prac. Bd. Op. No. 234 (1996).

2. Indirect gifts

Gifts that are not given directly from a lobbyist or other interested person to an official, but rather are passed through an intermediary with an express or implied condition or understanding that they will be given to an official, are nevertheless subject to the gift ban.

For example, when the Minnesota Association of County Officers requested an opinion on whether they could continue to accept contributions from lobbyists or lobbyists’ principals to help

defray the costs of group breakfasts, hospitality rooms, snacks, and refreshments, the Ethical Practices Board advised that the Association could not accept those contributions, unless the officials reimbursed the lobbyists or lobbyists' principals for the value of the benefits received. Eth. Prac. Bd. Op. No. 142 (1994). The ban applies whether the contributions are given to the organization itself or to a private nonprofit charitable organization that hosts an event on behalf of the organization. Eth. Prac. Bd. Op. No. 163 (1994).

On the other hand, where a lobbyist principal helped to underwrite the cost of a theatrical production by a nonprofit organization that presented it in performances that were free and open to the public, without any express or implied condition or understanding that the performances would be for the particular benefit of an official or group of officials, officials were not prohibited from attending the performances. Eth. Prac. Bd. Op. No. 227 (1996).

3. Gifts to an agent

Gifts given by a lobbyist principal to an official who acts as its agent for distribution of the gifts to foreign visitors are not within any exception to the gift ban. Eth. Prac. Bd. Op. No. 176 (1994).

4. Gifts to a group

Where a gift is given to a group of officials, the value of the gift to each official is the total value divided by the number of officials to whom the gift was given. Eth. Prac. Bd. Op. No. 160 (1994).

5. Partial gifts

Where the cost of goods or services provided to an official has been paid partly with contributions from a lobbyist or other interested person and partly from other sources, the official must reimburse the giver for the portion paid by the lobbyist in order for it not to be an illegal gift.

6. Accounting for gifts

Some problems with gifts could be solved by better accounting for receipts and disbursements. Where an organization plans to host an event with money received from various sources, some of which may come from lobbyists or other interested persons, the organization may wish to segregate the receipts and make sure that none of the money from lobbyists or interested persons is used to provide a gift to covered officials. If the receipts are properly segregated, a gift from nonlobbyist receipts is not prohibited. Eth. Prac. Bd. Op. No. 168 (1994).

7. Gifts Given Outside the State

The ban on gifts to officials applies to Minnesota officials even when the gift is given outside the state of Minnesota. Eth. Prac. Bd. Op. No. 160 (1994).

V. Exceptions

Every ban on gifts has its exceptions, and so does Minnesota's. They are listed in subdivision 3.

A. Campaign Contributions

The ban on gifts does not apply to campaign contributions under either Minn. Stat. § 10A.01, subd. 7 (1994) (state candidates), or Minn. Stat. § 211A.01, subd. 5 (1994) (local candidates). This is because the campaign contributions are limited in amount under §§ 10A.27 and 211A.12 (1994), and must be reported under §§ 10A.20 (1994) and 211A.02 (1994).

B. Services to Assist in the Performance of Official Duties

Lobbyists complained that a ban on donating services to an official would prohibit them from providing information and contacting key people to assist a legislator in passing legislation. The Senate Committee on Ethics and Campaign Reform responded by creating an exception for "services to assist an official in the performance of official duties, including but not limited to providing advice, consultation, information, and communication in connection with legislation, and services to constituents." Minn. Stat. §§ 10A.071, subd. 3 (a) (2); 471.895, subd. 3 (a) (2) (1994).

The Ethical Practices Board has advised that the following gifts fall within this exception: providing legislators with copies of their home newspapers during the legislative session, Eth. Prac. Bd. Op. No. 143 (1994); providing officials with a periodical publication on public policy issues related to transportation, Eth. Prac. Bd. Op. No. 156 (1994); providing them with a brochure about the legislative priorities of an organization, Eth. Prac. Bd. Op. No. 193 (1994); providing them with research and analysis materials relating to pending or recommended areas of legislation, Eth. Prac. Bd. Op. No. 234 (1996); providing them with copies of the annual membership directory of the Minnesota Broadcasters Association, Eth. Prac. Bd. Op. No. 204 (1995); training them in the operation of computer systems, Eth. Prac. Bd. Op. No. 157 (1994); and educating them at an issues forum sponsored by the American Legislative Exchange Council (ALEC), provided that the officials pay for the meals provided them at the issues forum, Eth. Prac. Bd. Op. No. 202 (1995).

The Board has found the following gifts to be prohibited: educational programs that do not have a direct bearing on issues currently under consideration by an official, but that expand the official's general knowledge of the subject matter, Eth. Prac. Bd. Op. No. 162 (1994); a bipartisan seminar to educate and inform officials about significant public policy, even when the lobbyist contributions are paid to a governmental body that controls the format and content of the seminar, Eth. Prac. Bd. Op. No. 172 (1994); services and educational programs sponsored by the Minnesota Coalition of Family Organizations, Eth. Prac. Bd. Op. No. 180 (1994); and transportation to enable an official to travel and promote business for the state, Eth. Prac. Bd. Op. No. 206 (1995).

C. Services of Insignificant Monetary Value

The bill as introduced in the Senate had included in the definition of "gift" a "favor," as that term had been used in the Wisconsin definition, Wis. Stat. Ann. § 19.42 (1) (Supp. 1993). Members of the Committee on Ethics and Campaign Reform complained that a ban on favors went too far.

both because it seemed unsociable to prohibit people from doing small favors for public officials and because it seemed impractical to try to enforce a ban on common courtesy, such as helping a stranded motorist to fix a flat tire. So the bill was amended to delete the ban on favors and to specifically exempt "services of insignificant monetary value." Minn. Stat. §§ 10A.071, subd. 3 (a)(3); 471.895, subd. 3 (a)(3) (1994).

D. Plaques or Mementos Recognizing Service

The exception for "a plaque or similar memento recognizing individual services in a field of specialty or to a charitable cause," Minn. Stat. §§ 10A.071, subd. 3 (a)(4); 471.895, subd. 3 (a)(4) (1994), was taken directly from the Code of Ethics for Employees in the Executive Branch, Minn. Stat. § 43A.38, subd. 2 (b) (1994). "Plaque or similar memento" has been defined by the Ethical Practices Board to mean "a decorative item with an inscription recognizing an individual for an accomplishment." Minn. Rules 4512.0100, subp. 5 (1996).

An award consisting of a printed certificate inserted in an inexpensive frame costing approximately \$2.99 has been found exempt. Eth. Prac. Bd. Op. No. 165 (1994). A scenic photograph with an inscription plate recognizing an official's service to the Sierra Club, a lobbyist principal, is exempt. Eth. Prac. Bd. Op. No. 198 (1995).

"Individual services" means services performed by an official outside of official duties. Minn. Rules 4512.0100, subp. 4 (1996). A plaque recognizing a legislator's voting record is not exempt. Eth. Prac. Bd. Op. No. 218 (1995). *Accord*, Eth. Prac. Bd. Op. No. 238 (1996).

E. Trinkets or Mementos of Insignificant Value

The exception for "a trinket or memento of insignificant value," Minn. Stat. §§ 10A.071, subd. 3 (a)(5); 471.895, subd. 3 (a)(5) (1994), was a product of committee discussion in the Senate, designed to save the pins, pens, cups, and calendars that some members were fond of.

The Ethical Practices Board, however, has interpreted this exemption not to cover either a leatherette pocket calendar and insert, valued at just over \$11, nor even a \$2 pocket calendar, both of which the Teamsters political committee wanted to give elected officials after the 1994 election. Eth. Prac. Bd. Op. No. 141 (1994). The Minnesota State Fire Department Association may not give its annual calendar book to public officials. Eth. Prac. Bd. Op. No. 189 (1994). The exception also does not cover a ceramic coffee cup with the logo of the Minnesota Medical Association printed on it. Eth. Prac. Bd. Op. No. 167 (1994). A plaque costing \$40 to \$85 is not of "insignificant value." Eth. Prac. Bd. Op. No. 218 (1995). A plaque valued at \$20 to \$100 is not of "insignificant value." Eth. Prac. Bd. Op. No. 238 (1996).

A computer mouse pad imprinted with a lobbyist's name, address, phone number, and other promotional information, with a retail value of \$3 to \$6, is a "trinket or memento of insignificant value." Eth. Prac. Bd. Op. No. 235 (1997).

F. Informational Material of Unexceptional Value

The exception for "informational material of unexceptional value," Minn. Stat. §§ 10A.071, subd. 3 (a)(6); 471.895, subd. 3 (a)(6) (1994), was designed to save papers, pamphlets, and brochures, but not to permit gifts of expensive books, such as might add elegance to a coffee table.

The Ethical Practices Board has advised that providing officials with a periodical publication on public policy issues related to transportation falls within this exception, as well as within the exception for services to assist an official in the performance of official duties. Eth. Prac. Bd. Op. No. 156 (1994). The annual membership directory of the Minnesota Broadcasters Association, Eth. Prac. Bd. Op. No. 204 (1995), and a black and white calendar containing informational material and selling for \$5, Eth. Prac. Bd. Op. No. 226 (1996), are within the exception.

Gifts of the following publications have been found by the Board to be prohibited: copies of the Minnesota Medical Association's monthly journal and twice-monthly newsletter, Eth. Prac. Bd. Op. No. 167 (1994); a book, *The Parental Alienation Syndrome*, intended to give legislators information about forthcoming legislative proposals on family law, Eth. Prac. Bd. Op. No. 200 (1995); and a "Tax Guide for Minnesota Legislators," intended to help legislators compile their own income taxes, Eth. Prac. Bd. Op. No. 203 (1995).

G. Food or Beverages Given in Connection with a Speech

As discussed earlier, the exemption for food or a beverage given at a reception, meal, or meeting away from the recipient's place of work by an organization before whom the recipient appears to make a speech or answer questions as part of a program is quite narrow. It does *not* have a dollar threshold, such as \$3 or \$5, beneath which gifts of food and beverages are permitted. It does *not* permit gifts of food and beverages to all the members of a legislative body just because all the members are given the same gift. And, it does *not* permit a gift of expenses for travel and lodging, even for an official who appears before an organization to make a speech or answer questions as part of a program. Each of those broader exemptions was considered during the legislative process, but none of them made it into the final bill.

Complimentary breakfasts given to legislators who appear at the Twin West Chamber of Commerce meetings to speak or respond to questions as part of a program have been approved. Eth. Prac. Bd. Op. No. 153 (1994).

Meals and lodging provided to officials who participate in workshops where all participants provide each other with advice, consultation, and information, and answer each other's questions, are not exempt. Eth. Prac. Bd. Op. No. 155 (1994). Nor are food and beverages provided as part of a program where legislators simply mingle with their constituents and respond to their questions, Eth. Prac. Bd. Op. No. 167 (1994), or sit with their constituents during dinner, Eth. Prac. Bd. Op. No. 185 (1994). Complimentary breakfasts in conjunction with a trade show, where officials do not make a speech or answer questions as part of a program, are clearly not exempt, and the person who asked about them was reminded by the Ethical Practices Board of the Board's many previous answers to similar questions. Eth. Prac. Bd. Op. No. 183 (1994). A meal provided while an

organization distributes a brochure and explains its legislative priorities is not exempt. Eth. Prac. Bd. Op. No. 193 (1994).

H. Gifts to Groups of Nonofficials

1. Gifts not related to the official's position

The prohibitions in the new law do not apply if the gift is given "because of the recipient's membership in a group, a majority of whose members are not officials, and an equivalent gift is given to the other members of the group." Minn. Stat. §§ 10A.071, subd. 3 (b)(1); 471.895, subd. 3 (b)(1) (1994). This is an attempt to provide an exemption for gifts that are not related to the recipient's position as a public official but given for some other reason. The requirements for membership in a group of nonofficials and for an equivalent gift to be given to those other members of the group are attempts to provide proof that the gift was not related to the official's public position.

Because the law uses an objective test, rather than a subjective one, it is necessary to meet the objective requirement of membership in a group, rather than showing subjective evidence of the giver's intent. A "group" must have certain incidents of formality or organization, such as a name, an organizational structure, meetings, and business to conduct. Being a former member of a law firm does not constitute membership in a "group." Eth. Prac. Bd. Op. No. 220 (1995).

There is no exception for a gift by a lobbyist principal to an official simply because the gift is unrelated to the official's position. Even when the gift clearly relates to the needs of the private employer of the official, Eth. Prac. Bd. Op. No. 174 (1994), or the private employer of the official's spouse, Eth. Prac. Bd. Op. No. 164 (1994), the official must pay for any benefits received from a lobbyist principal.

A lobbyist may not host a baby shower for an official, since that would involve the lobbyist giving the official refreshments and a gift for the baby and asking those attending the shower to give the official gifts for the baby. Eth. Prac. Bd. Op. No. 232 (1996).

2. Social gifts

The exception for gift given because of membership in a group should apply to a company social event that a public official attends as the spouse of a company employee. Where the group invited consists of company employees and their spouses, and a majority of the group are not public officials, any gift given to all the invitees should be considered exempt, since it is not related to the official's public position.

In one of its early decisions, the Ethical Practices Board said that an official who accompanies the official's spouse to a social event sponsored by the spouse's employer must pay for any benefit received from the employer if the employer is a lobbyist principal. Eth. Prac. Bd. Op. No. 164 (1994). More recently, however, the Board has said that an official who accompanies the official's spouse on a trip for two paid for by the spouse's employer as a reward for outstanding performance need not pay for the benefit received, since the trip is a form of compensation to the

employee and the law does not prevent the employee from sharing the compensation with the official. Eth. Prac. Bd. Op. No. 229 (1996).

3. National conferences

A second kind of problem arises when state-level officials from Minnesota attend a national meeting with their counterparts from other states. At that kind of meeting, although it is related to the official's public position, a majority of the group will usually not be "officials" within the meaning of the new law. This is because the definition of "official" in § 10A.071, subd. 2(c), refers to specific Minnesota offices, not to official positions generally. So a gift to all attendees at the meeting, even one from a corporation listed as a lobbyist principal in Minnesota, will be to a group, "a majority of whose members are not officials," and thus within the letter of this exemption. The exemption makes sense. If the group were Minnesota officials, we might expect them to change the arrangements for the meeting, so that no gifts would be given. But a national group may not have the same freedom to change to accommodate Minnesota officials, and it is better to tolerate the occasional gift than to foreclose attendance at national meetings.

The Ethical Practices Board, however, has advised to the contrary. It has found that the Executive Committee of the National Conference of State Legislatures is not a "group" within the meaning of the statute, and that any food and beverages given to its members by Minnesota lobbyist principals must be paid for by any Minnesota officials who accept them. Eth. Prac. Bd. Op. No. 173 (1994). Minnesota officials still attend the dinners, but pay for any food and beverages donated by corporations that lobby in Minnesota. The Board has also advised that, where the registration fee for the annual meeting of the Midwestern Legislative Conference of the Council of State Governments was subsidized by contributions from Minnesota lobbyist principals, Minnesota registrants could not accept this "gift" of a reduced registration fee. See Eth. Prac. Bd. Op. No. 175 (1994). *Accord*, Eth. Prac. Bd. Op. No. 179 (1994). Minnesota officials still attend the conferences, but pay a higher registration fee.

4. Gifts available to the public generally

Simply making a gift available to the public generally, as when the Minnesota Medical Association makes food and beverages, blood pressure screening, and skin cancer screening available in the capitol to anyone who appears, is not sufficient to bring it within the exemption for gifts given to a group, a majority of whose members are not officials. Eth. Prac. Bd. Op. No. 167 (1994).

5. Groups found exempt

The groups of nonofficials that the Board has found to fall within this exception include the following: the board of directors of a local credit union that provides free travel, lodging, and meals to those board members who attend board meetings, Eth. Prac. Bd. Op. No. 190 (1994); an advisory council to Blue Cross Blue Shield of Minnesota that provides meals and reimburses travel costs to its members, Eth. Prac. Bd. Op. No. 210 (1995); and a lobbying organization that reimburses members of its board of directors for their expenses incurred on behalf of the organization. Eth. Prac. Bd. Op. No. 234 (1996).

I. Gifts by Family Members

The exception for gifts "by a lobbyist [or interested person] who is a member of the family of the recipient, unless the gift is given on behalf of someone who is not a member of that family," Minn. Stat. §§ 10A.071, subd. 3 (b)(2); 471.895, subd. 3 (b)(2) (1994), is designed to address the problem of a public official whose spouse is a lobbyist and to permit the spouse to give the public official normal family gifts. "Family" is not defined in the law, and could either be narrowly construed as the members of a single household or broadly construed as all the blood relatives of a common ancestor. See BLACK'S LAW DICTIONARY 727-31 (4th ed. 1957); AMERICAN HERITAGE DICTIONARY 488 (2d col. ed. 1982). The Ethical Practices Board has not yet had to construe it either way in an advisory opinion and has declined to define it by rule.

VI. Enforcement

A. State Officials

1. Investigation by the Ethical Practices Board

Preexisting-existing law in chapter 10A authorizes the Ethical Practices Board to "investigate any alleged violation of this chapter. . . .

... [A]fter the board makes a finding of probable cause the board shall report that finding to the appropriate law enforcement authorities." Minn. Stat. § 10A.02, subd. 11.

2. Violation is not a crime

"Unless otherwise provided, a violation of sections 10A.02 to 10A.34 is not a crime." Minn. Stat. § 10A.34, subd. 3. There is no civil fine or penalty for violating the gift ban, but the board or a county attorney may seek an injunction in the district court to restrain its violation. Minn. Stat. § 10A.34, subd. 2. Eth. Prac. Bd. Op. No. 217 (1995).

3. Advisory opinions

"The board may issue and publish advisory opinions on the requirements of this chapter based on real or hypothetical situations." Minn. Stat. § 10A.02, subd. 12.

B. Local Officials

1. Violation is a misdemeanor

The jurisdiction of the Ethical Practices Board does not extend beyond chapter 10A, so some other enforcement mechanism is needed for the local officials covered by § 471.895. That enforcement mechanism is the general criminal law. "When the performance of any act is prohibited by a statute, and no penalty for the violation of the same shall be imposed in any statute, the doing of such an act shall be a misdemeanor." Minn. Stat. § 645.241.

This general criminal statute may not be as significant as it seems. My colleague who served as Senate Counsel for the Committee on Crime Prevention told me it was her understanding that no one has ever been prosecuted under this general criminal penalty. First, because many prosecutors are not aware of this general law, since it is outside the criminal code in chapter 609. Second, they may feel more comfortable relying on more specific statutes that specify the elements of the crime and provide a specific level of punishment.

2. Prosecution of misdemeanors

Within incorporated municipalities, prosecution of misdemeanors is normally handled by the city attorney. In other areas, it is done by the county attorney.

3. Possible amendment

After the gift ban left the Senate Committee on Ethics and Campaign Reform, there was some discussion of broadening the authority of the Ethical Practices Board to include violations of the gift ban by local officials and to eliminate the possibility of criminal prosecution. An amendment was included in the campaign finance reform bill, S.F. No. 943, that would have made that change. S.F. No. 943 passed out of committee but was never taken up on the Senate floor. In the 1995 session, a similar amendment was included in S.F. No. 339, which passed the Senate in the regular session but was returned to committee in the House when it was left on General Orders at the end of the session.

During the special session of 1995, after Senator Marty had negotiated a compromise bill with Representative David Bishop, the Senate passed S.F. No. 2. The compromise bill would have replaced the criminal penalty for local officials with a civil penalty imposed by the district court in a civil action brought by the county attorney. The penalty would have been up to \$100 for the first offense and up to \$500 for a subsequent offense. The House refused to consider the bill.

During the 1996 session, negotiations continued on amendments to S.F. No. 339 in the House that would be similar to the compromise proposed in S.F. No. 2. The bill was returned to the Committee on Ethics, which reported it out to pass as amended pursuant to the compromise, but the bill was never considered on the House floor.

VII. Examples

A. Schindler's List

B. The Distinguished Gentleman

APPENDIX

Minn. Stat. §10A.071 CERTAIN GIFTS BY LOBBYISTS AND PRINCIPALS PROHIBITED.

Subdivision 1. Definitions. (a) The definitions in this subdivision apply to this section.

(b) "Gift" means money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, that is given and received without the giver receiving consideration of equal or greater value in return.

(c) "Official" means a public official, an employee of the legislature, or a local official of a metropolitan governmental unit.

Subd. 2. Prohibition. A lobbyist or principal may not give a gift or request another to give a gift to an official. An official may not accept a gift from a lobbyist or principal.

Subd. 3. Exceptions. (a) The prohibitions in this section do not apply if the gift is:

(1) a contribution as defined in section 10A.01, subdivision 7;

(2) services to assist an official in the performance of official duties, including but not limited to providing advice, consultation, information, and communication in connection with legislation, and services to constituents;

(3) services of insignificant monetary value;

(4) a plaque or similar memento recognizing individual services in a field of specialty or to a charitable cause;

(5) a trinket or memento of insignificant value;

(6) informational material of unexceptional value; or

(7) food or a beverage given at a reception, meal, or meeting away from the recipient's place of work by an organization before whom the recipient appears to make a speech or answer questions as part of a program.

(b) The prohibitions in this section do not apply if the gift is given:

(1) because of the recipient's membership in a group, a majority of whose members are not officials, and an equivalent gift is given to the other members of the group; or

(2) by a lobbyist or principal who is a member of the family of the recipient, unless the gift is given on behalf of someone who is not a member of that family.

HIST: 1994 c 377 s 5

Minn. Stat. § 471.895 CERTAIN GIFTS BY INTERESTED PERSONS PROHIBITED.

Subdivision 1. Definitions. (a) The definitions in this subdivision apply to this section.

(b) "Gift" has the meaning given it in section 10A.071, subdivision 1.

(c) "Interested person" means a person or a representative of a person or association that has a direct financial interest in a decision that a local official is authorized to make.

(d) "Local official" means an elected or appointed official of a county or city or of an agency, authority, or instrumentality of a county or city.

Subd. 2. Prohibition. An interested person may not give a gift or request another to give a gift to a local official. A local official may not accept a gift from an interested person.

Subd. 3. Exceptions. (a) The prohibitions in this section do not apply if the gift is:

(1) a contribution as defined in section 211A.01, subdivision 5;

(2) services to assist an official in the performance of official duties, including but not limited to providing advice, consultation, information, and communication in connection with legislation, and services to constituents;

(3) services of insignificant monetary value;

(4) a plaque or similar memento recognizing individual services in a field of specialty or to a charitable cause;

(5) a trinket or memento of insignificant value;

(6) informational material of unexceptional value; or

(7) food or a beverage given at a reception, meal, or meeting away from the recipient's place of work by an organization before whom the recipient appears to make a speech or answer questions as part of a program.

(b) The prohibitions in this section do not apply if the gift is given:

(1) because of the recipient's membership in a group, a majority of whose members are not local officials, and an equivalent gift is given to the other members of the group; or

(2) by an interested person who is a member of the family of the recipient, unless the gift is given on behalf of someone who is not a member of that family.

HIST: 1994 c 377 s 6